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No. 80-1917

In the Supreme Court of the United States

October Term, 1980

PENNSYLVANIA GAS AND WATER COMPANY,

Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent.

[35 May Term, 1978]

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Pennsylvania Public Utility Commission properly determined that the Pennsylvania Gas and Water Company may not receive a return on an investment in facilities constructed with funds contributed by the general public?

2. Whether due process and equal protection of the law requires the Pennsylvania Supreme Court, when confronted by like issues, in discrete cases decided two years apart, is bound by the earlier of two decisions, where the earlier decision only resolved the issues between the parties and was not precedent?

3. Whether due process and equal protection of the law requires that the Pennsylvania Supreme Court decide a civil appeal within a specific time period, where the party asserting those constitutional infirmities has not been prejudiced?

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COUNTERSTATEMENT OF THE CASE

Petitioner, Pennsylvania Gas and Water Company (PG&W), seeks review of a July 9, 1974 Pennsylvania Public Utility Commission (Commission) rate determination, as affirmed by the state's highest court, the Supreme Court of Pennsylvania. A detailed review of the pertinent events of the proceedings below is appropriate before considering the Commission's arguments opposing the grant of a writ of certiorari.

On January 30, 1973, PG&W filed with the Commission a proposed rate increase calculated to produce approximately $4.8 million of additional annual revenues. The increase was requested in two separate stages; the first stage proposed an increase of approximately $2.2 million, and the second proposed an increase of an additional $2.6 million. The Commission permitted the entire first stage to become effective on April 12, 1973; however, the Commission suspended the operation of the second stage of the increase pending an investigation into the merits of both stages of the entire proposed increase.

On July 9, 1974, the Commission issued its final order in the rate investigation, which granted PG&W a rate increase of approximately $4.2 million, *or 87% of the amount requested by the utility.* The allowed rate increase provided the company with the opportunity to earn a 7.35% return on the "fair value" of its plant devoted to the public service, with fair value calculated as $102,000,000, or *149% of $68,288,850, which represents the company's claimed depreciated cost of its water plant.*

This 7.35% rate of return on fair value translated to a 10.98% return on the utility's claimed original cost rate base.

PG&W filed an appeal with an intermediate appellate court, the Commonwealth Court of Pennsylvania. In its appeal, PG&W challenged various Commission determinations, including the fair value and fair rate of return findings. The Commonwealth Court affirmed the July 9, 1974 order of the Commission in regard to all ratemaking issues except one. *Pa. P.U.C. v. Pennsylvania Gas and Water Company*, 19 Pa. Commonwealth Ct. 214, 341 A.2d 239 (1975); this latter opinion and order is reprinted in PG&W's petition for writ of certiorari, Appendix C. The only issue reversed by the intermediate appellate court was a rate base disallowance of approximately $2.5 million, representing utility property constructed with money obtained from a damage settlement payment made to PG&W by the Commonwealth of Pennsylvania, the Pennsylvania Department of Transportation (PennDOT).

The Commission generally agrees with statement of the factual background of the damage payment contained in PG&W's petition. The Commission, however, wishes to emphasize one additional point. In addition to the damage payment received from PennDOT, PG&W invested $243,202 of additional funds for the construction of a pipeline, and $4,122,290 for the construction of the reservoir. The additional funds invested by the company were *included* in PG&W's rate base in the Commission's rate order of July 9, 1974. In addition, the Commission permitted the company to recover its maintenance and operating expenses attributed to the pipeline and reservoir. The Commission, however, disallowed from PG&W's claimed rate base the amount of $2,558,634, representing

the net of the PennDOT payment of $2,754,754, less PG&W's unrecovered investment in the replaced plant. In making this exclusion, the Commission reasoned that PennDOT's payment should be treated for accounting and ratemaking purposes as a contribution in aid of construction in order to balance equitably the interests of the customers and interests of the utility.

As previously noted, on May 27, 1975, the intermediate appellate court reversed the Commission's order with respect to the ratemaking treatment given the PennDOT payment. On the same day, the intermediate appellate court issued another decision reversing a similar ratemaking determination by the Commission in a case involving another utility, the Keystone Water Company. *See Keystone Water Company, White Deer District v. Pa. P.U.C.*, 19 Pa. Commonwealth Ct. 292, 339 A.2d 873 (1975); this decision is also reproduced in PG&W's petition for a writ of certiorari, Appendix E.

On June 26, 1975, the Commission petitioned the Supreme Court of Pennsylvania for allowance of appeals from both lower court decisions involving PG&W and Keystone Water Company, and requested a supersedeas of the lower court's decision in the case involving PG&W. The Pennsylvania Supreme Court granted the Commission's request for an allowance of an appeal from the *Keystone* decision. On April 7, 1978, in *Keystone Water Co., White Deer District v. Pa. P.U.C.*, 477 Pa. 594, 385 A.2d 946 (1978), the Pennsylvania Supreme Court, in a per curiam opinion, affirmed the order of the Commonwealth Court *for the stated reason that the Supreme Court was equally divided on the question involved. See* PG&W's petition for writ of certiorari, Appendix F, p. A93. Less than three months later, on June 21, 1978, the Pennsyl-

vania Supreme Court granted the Commission's petition for allowance of an appeal from the lower court's *PG&W* decision, and on August 11, 1978, the Supreme Court of Pennsylvania granted the Commission's petition for supersedeas of the Commonwealth Court's order in *PG&W*. *See* Appendix A of this brief in opposition to petition for writ of certiorari.

On February 1, 1980, the Supreme Court of Pennsylvania entered a judgment and opinion reversing the Commonwealth Court's decision in *PG&W*, and reinstated the Commission's July 9, 1974 rate determination. On February 24, 1981, the Pennsylvania Supreme Court denied an application for reargument filed by PG&W.

The instant petition for a writ of certiorari is now pending before your Honorable Court.

REASONS FOR DENYING THE WRIT

I. The Pennsylvania Public Utility Commission's Resolution of a Single Issue in a Complex Rate Determination Does Not Raise a Constitutional Question When the Ultimate Rate Result Reached Is Not Challenged as Being Unjust and Unreasonable

If your Honorable Court were to grant the requested writ of certiorari, PG&W proposes to argue first the appropriate ratemaking treatment to be given to the PennDOT damage payment. A review of the applicable precedent reveals that PG&W's first question presented for review raises the same kind of routine ratemaking issue which this Honorable Court, over thirty-six years ago, determined to be beyond the scope of judicial review and inquiry. *See Federal Power Commission v. Hope Natural Gas Company,* 320 U.S. 591 (1944). The Commission decision which PG&W would have this Court review simply does not raise an issue of constitutional proportions; accordingly, there are no special or important reasons for granting a writ of certiorari.

The Commission is a legislative instrumentality performing the Commonwealth of Pennsylvania legislature's exclusive function of exercising the sovereign police power in the regulation of rates and services of public utilities. *See* Act of May 28, 1937, P.L. 1053 (66 P.S. §1101 *et seq.*), *repealed,* now codified as the Public Utility Code, Act of July 1, 1978, P.L. 598, 66 Pa. C.S. §101, *et seq.*

Section 1301 of the Public Utility Code, 66 Pa. C.S. §1301 provides, in pertinent part, that "[e]very rate made, demanded or received by any public utility . . . shall be just and reasonable. . . ." PG&W now seeks to challenge in this Honorable Court the Pennsylvania Supreme Court's affirmance of the Commission's resolution of the proper ratemaking treatment to be afforded the PennDOT damage payment. However, PG&W does *not* challenge the Commission's July 9, 1974 rate determination on the grounds that the *overall result* of the $4.2 million increase allowed is unjust and unreasonable; nor has PG&W contended that the return allowed is insufficient to permit the company to operate successfully, to maintain its financial integrity, to attract capital, or to compensate its investors for the risks assumed.

Specifically, the Commission's position is that since PG&W has not challenged the ultimate rate result reached in the Commission's July 9, 1974 order, no constitutional issue is presented. A review of the decisions of this Court supports the Commission's position.

It is settled that the Fourteenth Amendment to the United States Constitution does not prohibit the states' regulation of the rates to be charged by public utilities, which are private businesses affected with the public interest. *Munn v. Illinois,* 94 U.S. 113 (1876). Of course, the rates fixed for public utilities by the states may be overturned upon judicial review, where those rates are found to be tantamount to a deprivation of the lawful use of private property. *Chicago Milwaukee and St. Paul Ry. v. Minnesota,* 134 U.S. 418 (1890). The troublesome question which concerned your Honorable Court for over half a century was what rate level amounted to a deprivation of the use of private property, or an illegal confiscation.

While various "confiscatory" standards have been expressed,[1] it was established "[b]y long standing usage in the field of rate regulation [that] the 'lowest reasonable rate' [in a zone of reasonableness] is one which is not confiscatory in the constitutional sense." *Federal Power Commission v. Natural Gas Pipeline Co. of America,* 315 U.S. 575, 585 (1942) (citations omitted).

The pertinent question for the judiciary, upon review of a legislative ratemaking determination, is whether the rates established are unconstitutionally low. In *Natural Gas Pipeline Co.,* Chief Justice Stone discussed the narrow scope of judicial review of rates prescribed by the Federal Power Commission:

> The constitution does not bind ratemaking bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. *If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary results, our inquiry is at end.*

Id. at 586. (Emphasis added.)

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[1] For example, in *St. Louis & San Francisco Railway v. Gill,* 156 U.S. 649, 647 (1895), the Court noted that confiscation results where there exists "a tariff of rates which is so unreasonable as to practically destroy the value of property. . . ."

In the landmark case of *Hope Natural Gas Company*, your Honorable Court further delineated the appropriate scope of judicial review of ratemaking determinations. Rates are not confiscatory if they are just and reasonable,[2] and the reasonableness of rates established by a legislative body is to be reviewed by an appellate court under an economic viability standard. Justice Douglas stated:

> [W]hen the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirement of the [Natural Gas] Act. . . . Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. . . . It is not theory but the impact of the rate order which counts. *If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.*
>
> * * *
>
> Rates which enable a company to operate successfully, to maintain its financial integrity, to attract capital and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called 'fair value' rate base.

Id. at 602. (Emphasis added.)

Id. at 605.

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[2] In *Hope Natural Gas Company*, this Court found that "[s]ince there are no constitutional requirements more exacting than the [just and reasonable] standards of the [Natural Gas] Act, a rate order which conforms to the latter does not run afoul of the former." *Id.* at 607. As previously noted, the Commission is bound by a similar "just and reasonable" standard in setting rates. *See* 66 Pa. C.S.§1301.

PG&W's request for a writ of certiorari does not contend that the Commission's July 9, 1974 rate order, reinstated by the Pennsylvania Supreme Court, when viewed in its entirety, has rendered the company unable to operate successfully, to maintain financial integrity, to attract capital, or to compensate its investors. Rather, PG&W simply seeks review of a single rate case issue decided adversely to it by the Commission and the state's highest court. It is submitted that no constitutional issue has been raised. *Hope Natural Gas Company.*

PG&W's argument that the effect of the Commission's decision is to give the company's private property to the ratepayer, contrary to this Court's decision in *Board of Utility Commissioners v. New York Telephone Company,* 271 U.S. 23 (1926), lacks merit. Petitioner has stated that "[*h*]*ad PG&W not been a public utility* with a legal duty to render adequate service, the [PennDOT] damage proceeds could have been distributed in the form of dividends to its stockholders." Petition for Writ of Certiorari, P. 8 (emphasis added). Such a statment ignores the very essence of the proper ruling in the court below; *PG&W is a public utility,* and as such it was obligated by law to ensure that adequate service to the City of Scranton was maintained. *See* the Pennsylvania Public Utility Code, 66 Pa. C.S. §1501. Furthermore, PG&W was only able to receive "cost-to-cure" damages of $2,754,754 because of its unique responsibilities as a public utility. *See Pennsylvania Gas and Water Company v. Pennsylvania Turnpike Commission,* 428 Pa. 74, 236 A.2d 112 (1967).

Finally, the decisions below are not contrary to *Board of Utility Commissioners,* which is inapposite. In *Board,* the state commission recognized that its establishment of overall rates was insufficient to yield a reasonable return;

however, the commission's view was that the company's past collection of monies supplied by ratepayers, represented by a credit balance in the depreciation reserve account, could be used to make up the deficiency. This Court rejected the state commission's contentions, holding that: "the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future." *Id.* at 32. In the instant case, there is no question that the Commission's July 9, 1974 rate order was based upon the determination of PG&W's *current* revenue requirement.

II. The Action of the Pennsylvania Supreme Court in Reversing the Decision of the Intermediate Appellate Court Did Not Deny the Petitioner Due Process or Equal Protection of Law

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PG&W argues in the second and third reasons for granting the writ that it was denied due process and equal protection of law by the action of the Pennsylvania Supreme Court in reversing the decision of the intermediate appellate court. The Commission respectfully submits that these arguments are unsupported by the law or by the record in this case.

This Honorable Court has previously recognized that the Constitution does not require a state to provide appellate courts, but that when an appeal is permitted, it must meet the requirements of due process and equal protection. *Griffin v. Illinois,* 351 U.S. 12, 18 (1955); *see also Douglas v. California,* 372 U.S. 353 (1963). PG&W exercised its Pennsylvania statutory right of appellate review of the Commission's rate determination by filing an appeal to the

Commonwealth Court of Pennsylvania. Upon reversal by the intermediate appellate court, the Commission sought discretionary review by the state's highest appellate court, the Pennsylvania Supreme Court. It is upon this subsequent review of the intermediate appellate court's decision that PG&W bases its allegations of constitutional infirmity. The Commission respectfully submits that PG&W's arguments in support of its allegations are unpersuasive.

PG&W argues that the time periods associated with the Pennsylvania Supreme Court's decisions to hear the appeal and to issue subsequently an opinion worked a denial of due process and equal protection. PG&W, however, has failed to establish that the delays it complains of were unusual, or that there existed an invidious discrimination by the Pennsylvania Supreme Court. PG&W only has established that the discretionary review procedures of the Pennsylvania Supreme Court may take several years. On this basis, PG&W has failed to support its conclusionary allegations of a denial of due process or equal protection by the Court below.

PG&W's argument is weakened further by an examination of it in the context of the instant case. PG&W is complaining about the time periods associated with an appeal *taken by the Commission* in this matter. Unlike the precedents in the Federal Circuit Courts, which have held that an unjustified delay in an appeal of a criminal conviction can work a denial of due process, *see e.g. United States ex rel. Smith v. Twomey*, 486 F.2d 736 (7th Cir.), *cert. denied* 416 U.S. 994 (1973), PG&W was not the appellant in the appeal it complains of. Moreover, any delays associated with the Commission's appeal to the Pennsylvania Supreme Court were not prejudicial to PG&W in any sense.

The Commonwealth Court reversed the Commission's rate determination by an opinion and order filed May 27, 1975. The Court remanded the matter to the Commission and directed it to amend its determination to recognize the proceeds of the highway damage payment, and to make any associated depreciation adjustments. The Commission complied with this direction in a final order dated July 7, 1976, wherein it concluded a subsequent rate proceeding involving PG&W. The Commission stated in its July 7, 1976 order:

> *In accordance with the Commonwealth Court Order and for the purposes of concluding these present proceedings, we will allow that portion of respondent's property financed by the Commonwealth payment in our determination of fair value. In addition, we will make an appropriate annual depreciation allowance for that property.* However, it is still the opinion of this Commission that the Commonwealth payment is an excludable item from cost of service on the basis of it being a contribution of funds and not funds supplied by the stockholder. Accordingly, on June 26, 1975, the Commission filed a Petition for an Allowance of Appeal of the Commonwealth Court Order with the Pennsylvania Supreme Court. At this time, the Supreme Court has neither granted nor denied this petition. In the event that the Commonwealth Court Order is subsequently reversed and the Supreme Court maintains the Commission's position therein, respondent may be required to refund to customers, with interest, such amounts as are included in the cost of service relative to the facilities financed by the Commonwealth payment. (Emphasis added.)

Therefore, the Commission complied with the direction of the intermediate appellate court even while it pursued its appeal to the Pennsylvania Supreme Court. In this context, the time periods associated with the Commission's further appeal worked no prejudice to PG&W at all, since the contested rate base adjustment had already been accomplished. PG&W's argument that it was subjected to the possibility of refunds lacks merit. The Commission's July 7, 1976 order clearly put PG&W on notice that it could collect the revenues in question only subject to possible refunds; any doubt that PG&W may have had that it was collecting revenues at its peril was removed absolutely by the Pennsylvania Supreme Court's grant of a supersedeas on August 11, 1978. This complete lack of prejudice to PG&W deflates its argument that the time periods associated with the Commission's appeal to the Pennsylvania Supreme Court somehow denied it due process and equal protection of the law.

PG&W also argues that the decision of the Court below in reversing the intermediate appellate court and reinstating the Commission's rate determination was itself a violation of due process and equal protection. As argued by PG&W, "the action of the Court below in rendering two totally inconsistent decisions in appeals filed on the same day, by the same party and involving the same issue is a violation of the Fourteenth Amendment" (footnote omitted). Again, the argument is unsupported by the law or the record in this case. The gravamen of PG&W's argument is that its constitutional rights were violated because the Pennsylvania Supreme Court reached inconsistent results in two appeals presenting similar issues. This argument, distinguished by the absence of specific supporting citation

and by a subtle twisting of the facts, completely lacks merit.

The rate base issue which is raised by PG&W was decided in two opinions issued by the Commonwealth Court on the same day. Both of these opinions reversed rate base determinations made by the Commission. Further review of both cases by the Pennsylvania Supreme Court was sought by the Commission. Although the petitions for allowance of appeal of both cases were filed simultaneously, decisions in the cases by the Pennsylvania Supreme Court were returned several years apart.

In the first case, *Keystone Water Company, White Deer District v. Pennsylvania Public Utility Commission,* 477 Pa. 594, 385 A.2d 946 (1978) (Appendix F in the Petition), the Pennsylvania Supreme Court affirmed, by an equally divided court, the Commonwealth Court's decision that the Respondent's ratemaking exclusion was a violation of due process. In that case, the Court issued three opinions which included a *per curiam* opinion affirming the lower court's decision because of the equally divided court, as well as opinions in support of reversal and affirmance, each subscribed to by half of the court. In the instant case, the Pennsylvania Supreme Court took a longer period to grant the appeal and return a decision essentially adopting the opinion in support of reversal issued in the prior *Keystone* case. Such a result, however, violated none of PG&W's constitutional rights.

Initially, any suggestion that the lower Court's departure from precedent in reaching its decision was itself a violation of the Petitioner's constitutional rights is unsupportable. Like any court, the Pennsylvania Supreme Court is free to reexamine its precedent at any time in light of

changed circumstances or even changed Court composition. As noted by this Court in *Fidelity & Columbia Trust Co. v. City of Louisville,* 245 U.S. 54, 60 (1917), appellate courts are free to depart from precedents if on further reflection it thinks them wrong. In the instant case, the Pennsylvania Supreme Court simply examined its opinion in support of affirmance in the *Keystone* case, and found it to be incorrect.

The Petitioner's alternative argument that the Pennsylvania Supreme Court's inconsistent results in the *Keystone Water Co.* and the instant case violated its constitutional rights because they "involved appeals filed on the same day by the same party," likewise is unsupportable. As previously indicated, the Pennsylvania Supreme Court's affirmance of the intermediate appellate court's decision resulted only by operation of law, by virtue of the Court being equally divided on the issue. The opinion in support of reversal in *Keystone Water Co.* (Appendix F, page A111 of Petition) foreshadowed the result subsequently reached by the Court below in the instant case. This Honorable Court has held previously that *affirmance by an equally divided Court merely ends the process of direct review, settles no issue of law and is not entitled to precedential weight. Neil v. Biggers,* 409 U.S. 188, 192 (1972); *Laird v. Tatum,* 409 U.S. 824 (1972). A similar view has been adopted by the Pennsylvania Supreme Court. *Scibilia v. City of Philadelphia,* 279 Pa. 549, 124 A. 273 (1924). Therefore, the fact that the Supreme Court of Pennsylvania reached a result by operation of law in *Keystone Water Co.* that was inconsistent with the result reached in the instant case, is of no consequence.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should deny Pennsylvania Gas and Water Company's Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,
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APPENDIX "A"

SUPREME COURT OF PENNSYLVANIA
Middle District

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Re: PUC, Petitioner v. Pa. Gas & Water Co. (Water Div.)
City of Scranton, et al. v. Pa. Gas & Water Co. (Water Div.)

No. 195 Allocatur Docket

Dear Mr. Ferraro:

Please be advised that the Court has entered the following Orders on your Petition for Allowance of Appeal with Supersedeas from the Commonwealth Court in the above-captioned matter:

"June 21, 1978

Petition for Allowance of Appeal Granted.

s/ Per Curiam

"August 11, 1978

Petition for Supersedeas Granted.

s/ Nix, J.

Accordingly, your appeal has been docketed as of August 15, 1978 at No. 35 May Term, 1978. Appellant's briefs are due on or before October 2, 1978, and Appellee thirty days thereafter.

Very truly yours,
(s) Mildred E. Williamson
Deputy Prothonotary